

OBJECTIONS TO THE ISSUANCE OF SECOND ORDER MODIFYING ORDER FORMING CLAY TOWNSHIP REGIONAL WASTE DISTRICT, CLAY TOWNSHIP, HAMILTON COUNTY, INDIANA

Clay Township of Hamilton County, Indiana, by Judith F. Hagan, Clay Township Trustee, Petitioner;
The Board of Trustees of the Clay Township Regional Waste District, Respondent;
Board of Commissioners of Boone County and Town of Zionsville, Interveners;
Indiana Department of Environmental Management, Respondent.
2007 OEA 8 (06-W-J-3660)

TOPICS:

Regional Waste District	full faith and credit
board expansion	governing entities
jurisdictional territories	IC 5-14-1.5-6.1
district name change	IC 13-26-1-2
Open Door Violation	IC 13-26-1-3
resolution	IC 13-26-4-4
Executive Session	IC 4-21.5-3-21
intervener	315 IAC 1-3-13
<i>pro se</i>	

PRESIDING JUDGE:

Daidsen

PARTY REPRESENTATIVES:

Petitioner:

Clay Township of Hamilton County, Judith Hagan, Clay Township Trustee:
David E. Wright, Esq., William Bock, Esq., Jeffrey L. Logston, Esq.,
Kroger, Gardis & Regas, LLP

Respondent:

Central Indiana Regional Waste District, f/k/a Clay Township Regional Waste District:
Anne Hensley Poindexter, Esq., Campbell Kyle Proffitt, LLP

Interveners:

Board of Commissioners of Boone County, and Town of Zionsville:
Steven M. Sherman, Esq., Andrew B. Buroker, Esq., Krieg DeVault, LLP

Respondent:

Indiana Department of Environmental Adjudication: Nancy A. Holloran, Esq.

ORDER ISSUED:

January 18, 2007

INDEX CATEGORY:

Water

FURTHER CASE ACTIVITY:

appealed: Town of Zionsville v. IDEM and OEA, 49F12-0702-PL-006016 (Marion Super.
Environ. 2002) **dismissed**

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Indiana Department of Environmental Management, Respondent;
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IN THE MATTER OF:)
)
)
OBJECTIONS TO THE ISSUANCE OF)
SECOND ORDER MODIFYING ORDER)
FORMING CLAY TOWNSHIP)
REGIONAL WASTE DISTRICT)
CLAY TOWNSHIP,)
HAMILTON COUNTY, INDIANA)
) CAUSE NO. 06-W-J-3660

FINAL ORDER GRANTING JOINT MOTION AMENDING EFFECTIVENESS OF THE DECEMBER 16, 2005 ORDER AND DISPOSING OF ALL ISSUES

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FINDINGS OF FACT

1. The current parties to this proceeding are the Clay Township Regional Waste District (the "District"), the Indiana Department of Environmental Management ("IDEM"), Clay Township of Hamilton County Indiana, by Judith F. Hagan, Clay Township Trustee (the "Township"), the Board of Commissioners of Boone County ("Boone County") and the Town of Zionsville ("Zionsville").¹
2. Through their September 27, 2006 Joint Motion, the Township, the District and IDEM have jointly sought approval of the underlying motion amending effectiveness of the December 16, 2005 Order (the "Order") and disposing of all issues.
3. The Order is based upon two (2) separate petitions from the District: 1) the first petition was dated October 13, 2004 requesting removal of Woodland Section II from its jurisdictional territories and 2) and the second petition dated December 13, 2005 requesting expansion of the Board and a name change for the District.
4. Both District petitions were based upon Resolutions made by the Clay Township Regional Waste District ("District"). The December 12, 2005 District Resolution, which requested Board expansion and a District name change, was presented to IDEM as the December 13, 2005 petition. IDEM's December 16, 2005 Order approving the District's petition is the subject of controversy in this cause. There has been no challenge before this Court to the October 13, 2004 Petition concerning the removal of Woodland Section II from the District's jurisdictional territories.
5. The effectiveness of the December 16, 2005 Order has been stayed and will continue to be stayed until resolution of the matter.
6. Because of the stay of effectiveness of the Order, the Board currently seated is the correct and lawful Board.
7. The Township filed an Open Door Violation action in Hamilton County Superior Court on January 3, 2006 alleging violations based upon the Board's actions in the Executive Session of December 12, 2005 and the lack of certification of topics discussed in the Executive Session Minutes.

¹ The Board of Commissioners of Boone County and the Town of Zionsville were represented by Ice Miller and specifically attorney Donald Snemis in the proceedings before the OEA. On March 31, 2006, Mr. Snemis filed his Petition to Withdraw his Appearance at the request of the Board of Commissioners of Boone County and the Town of Zionsville. This Petition was granted on April 4, 2006. An appearance was subsequently filed by Krieg DeVault and specifically attorney Steven Sherman on October 18, 2006 in conjunction with the filing of an objection to this Joint Motion. However, at the time of the filing of this Joint Motion, neither the Board of Commissioners of Boone County nor the Town of Zionsville were represented by counsel; legal representation resumed on October 18, 2006.

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8. Hamilton County Superior Court entered a Final Judgment and Order on June 21, 2006 stating in pertinent part that:
 - (a) The District violated I.C. 5-14-1.5-6.1 in failing to certify its Executive Session Minutes of the December 12, 2005 Executive Session.
 - (b) The December 12, 2005 Resolution of the District which resolved to petition the Indiana Department of Environmental Management (“IDEM”) for a modification of the appointing authority of the Board members or in the alternative, expand the Board membership by adding four (4) additional appointees shall be voided and have no effect.
9. More than thirty (30) days have passed since the entry of the Final Judgment and Order from Hamilton County Superior Court and no appeal or notice of appeal has been taken.
10. After the Joint Motion was filed, the Court’s October 25, 2006 Order set the matter for Status Conference on November 6, 2006, and for hearing on the Joint Motion on November 14, 2006. At the November 6, 2006 Status Conference, in which all parties were represented by counsel, the parties indicated their schedule preferences, which were incorporated into the Court’s November 8, 2006 and November 27, 2006 scheduling orders, which set a hearing on the Joint Motion for December 13, 2006. The Court’s November 27, 2006 Case Management Order further incorporated the parties’ scheduling preferences, and scheduled the matter for briefing in lieu of hearing, and vacated the December 13, 2006 hearing on the Joint Motion.
11. On December 20, 2006, Eric M. Hand filed a letter (“Letter”) with the Court (via facsimile, email, regular mail, and hand delivery). As the Letter had not been served on all parties, the Court served a copy on the parties via email redistribution of the email sent to the presiding Environmental Law Judge. In his Letter, Mr. Hand sought to object to the Joint Motion so as to allow Board expansion. Mr. Hand stated that copies had not been served except to the Court, that he did not have legal representation but that the respective parties and counsel were aware of his views, sought tolerance for any procedural defects, and indicated a right to hearing as provided in Ind. Code § 13-26-2-7 and 13-26-4-4. Mr. Hand further indicated that he was providing the Letter from his perspective as a concerned private citizen, residing within the District’s territory, and as a 6-year public servant Board of Trustee (here, referred to as “Township”) member, appointed by the Boone County Commissioners. In his Letter, Mr. Hand based his plea for the Court’s denial of the parties’ Joint Motion upon district composition indicated in provisions of Ind. Code § 13-26, et seq., noting different, if not competing, interests pursued by the District and the Township in arriving at the Resolution and his stance on those views.
12. The only evidence of Resolutions made by the District, Township, or any other entity claiming authority to act on their behalf, concerning expansion of the Board and a name change for the District is the December 12, 2005 Resolution.

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13. This Court has fully considered the underlying Joint Motion as all parties have been given the opportunity to be heard and all parties have been given the opportunity submit briefs in support of and in opposition to the Joint Motion.

CONCLUSIONS OF LAW

1. The Office of Environmental Adjudication (“OEA”) has jurisdiction over the decisions of the Commissioner of the Indiana Department of Environmental Management (“IDEM”) and the parties to this controversy pursuant to Ind. Code § 4-21.5-7, et seq.
2. This is a Final Order issued pursuant to IC § 4-21.4-3-27 and 315 IAC 1-3-13. Findings of Fact that may be construed as Conclusions of Law and Conclusions of Law that may be construed as Findings of Fact are so deemed.

December 20, 2006 Letter from Eric M. Hand

3. Eric M. Hand, a Boone County Commissioners’ appointed member of the Township Board of Trustees, is a member of two parties represented before the Court in this matter by counsel. The representations made in Mr. Hand’s letter are contrary to the positions taken by Counsel for the Township, advocate Mr. Hand’s positions on issues taken under deliberation by the Township, which positions are cumulative or supplemental to the positions taken by Intervener Boone County Commissioners, and contradictory to the current position of the Township and District. Mr. Hand’s Letter was filed on the date when Intervener’s Response was due, which may reasonably infer that his Letter was supplemental to Intervener’s Response. To the extent that Mr. Hand sought to present evidence or argument on behalf of either party, his Letter is inadmissible as cumulative, and not presented by the authorized legal representative for either entity appearing before this Court.
4. Eric M. Hand’s ability to participate in this proceeding must also be evaluated as his status as an individual. Ind. Code § 4-21.5-3-21 provides, in pertinent part:
 - (a) Before the beginning of the hearing on the subject of the proceeding, the administrative law judge shall grant a petition for intervention in a proceeding and identify the petitioner in the record of proceeding as a party if:
 - (1) the petition:
 - (A) is submitted in writing to the administrative law judge, with copies mailed to all parties named in the record of proceeding; and
 - (B) states facts demonstrating that a statute gives the petitioner an unconditional right to intervene in the proceeding; or
 - (2) the petition:
 - (A) is submitted in writing to the administrative law judge, with copies mailed to all parties named in the record of proceeding, at least three(3) days before the hearing; and

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(B) states facts demonstrating that the petitioner is aggrieved or adversely affected by the order or a statute gives the petitioner a conditional right to intervene in the proceeding.

...

(c) After the beginning of the hearing on the subject of the proceeding, but before the close of evidence in the hearing, anyone may be permitted to intervene in the proceeding if:

- (1) a statute confers a conditional right to intervene or an applicant's claim or defense and the main action have a question of law or fact in common; and
- (2) the administrative law judge determines that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention.

In exercising its discretion, the administrative law judge shall consider whether the intervention will unduly delay or prejudice the adjudication of the legal interests of any of the parties.

5. Mr. Hand's December 20, 2006 Letter fails to comply with IC 4-21.5-3-21(a)(1)'s requirements that it consist of a writing distributed to the parties of record and demonstrate an unconditional statutory right to intervene. First, an intervener's conduct is determined by the scheduled hearing date. In this cause, the parties' counsel had sought and vacated two hearing dates on the Joint Motion, and had elected not to proceed to hearing on the ultimate issues of fact and law as well, all before Mr. Hand filed his December 20, 2006 letter. Mr. Hand's Letter does not meet the time requirements of IC 4-21.5-3-21(a) or (c). While Mr. Hand sought the Court's leave for procedural errors, the statute also specifically requires that a writing be distributed to the parties of record, which Mr. Hand expressly states he elected to omit. "A litigant who chooses to proceed *pro se* will be held to the same rules of procedure as trained legal counsel and must be prepared to accept the consequences of his action." *Shepherd v. Truex*, 819 N.E.2d 457, 463 (Ind. Ct. App. 2004). Even if Mr. Hand's failure to file his Letter in the proscribed time periods prior to hearing, or to distribute his Letter to the parties of record could be discretionary under IC 4-21.5-3-21(a), the statutory authority contained in IC 13-26, et seq., and relied upon by Mr. Hand, addresses conduct at the District level, and does not convey either a conditional or unconditional right to intervene at the administrative adjudicatory level, which is subject to IC 4-21.5, et seq.

Further, Mr. Hand's Letter contains issues and conduct which were delegated to the Township or the District, and dealt with through the process available to those entities. To the extent that Mr. Hand provides information which is not cumulative, it seeks the Court to override the deliberative processes within the control of the parties and their voting constituents, which this Court has no authority to do. Should this Court improperly extend its authority, this matter would require a review of all viewpoints presented to the parties in their deliberations, all to achieve an impermissible encroachment by this Court upon the parties' rights, and upon the citizens who elect their local officials who direct the parties'

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actions. The interests of justice and the orderly and prompt conduct of this proceeding will be impaired by allowing the intervention, and will unduly delay or prejudice the adjudication of the legal interests of the parties.

6. Mr. Hand's December 20, 2006 letter remains cumulative to information already placed before the Court. Mr. Hand has no statutory right to intervene at this time in this cause, and the Letter will be stricken. The Court will consider briefs presented by the parties of record to this cause in making its determination.

Hamilton County Superior Court June 21, 2006 Order's effect on the validity of IDEM's decision on the District's Petition

7. Expansion of the Board and change of the District name cannot be accomplished by order of this Court, based on the status of the controversy before it. Governing entities, such as the District, act only through their minutes and records produced from duly organized meetings. *Odgen v. Premier Properties USA, Inc.*, 755 N.E.2d 661, 669 (Ind. Ct. App. 2001)(citing *Scott v. City of Seymour*, 659 N.E.2d 585, 590 (Ind. Ct. App. 1995)). While Ind. Code § 13-26-1-3 may not require a resolution for the filing of a petition to modify the district, Ind. Code § 13-26-1-2 does require the District to file a petition with IDEM in order to modify or increase the number of its trustees. The District has not acted to petition IDEM in order to change the number of its trustees, to correct its minutes or to make a nunc pro tunc entry in order to correct the defects noted in the Hamilton Superior Court's June 21, 2006 Order.² This Court cannot exceed its jurisdiction and act in the District's stead.
8. Hamilton Superior Court had exclusive jurisdiction over the open door issues concerning the December 12, 2005 Resolution. This Court must give full faith and credit to the Hamilton Superior Court's June 21, 2006 determinations on the validity concerning the proceedings which generated the December 12, 2005 Resolution. The Hamilton Superior Court's June 21, 2006 Final Judgment and Order of the Hamilton Superior Court, rendered the December 12, 2005 District resolution as null and void. The portions of IDEM's December 16, 2005 Order as it relates to the actions requested from the December 12, 2005 Petition (expansion of the Board and change of the District's name) must likewise be deemed null and void, since IDEM's Order was based on a now-void December 12, 2005 Petition. This Court cannot give any legal effect as to those portions which were declared null and void in the Hamilton Superior Court's Order. IDEM's December 16, 2005 Order that relates to the December 12, 2005 Resolution shall have no effect and shall be and is hereby deemed null and void. However, the part of the December 16, 2005 Order that relates to the October 13, 2004 Petition (removal of Woodland Section II from the District's jurisdictional territories), the validity of which is not in question, shall be in immediate full force and effect.

² To the contrary, the District has engaged in active litigation before the Office of Environmental Adjudication to enforce the terms of the Hamilton Superior Court's June 21, 2006 Order.

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IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the effectiveness of the December 16, 2005 Order from the Indiana Department of Environmental Management shall be amended to reflect that the Board will not be expanded and the name of the District will not change. However, the part of the December 16, 2005 Order granting that Woodland Section II be removed from the jurisdictional territory of the District shall be unchanged and in immediate full force and effect.

You are hereby further notified that pursuant to provisions of Indiana Code § 4-21.5-7.5, the Office of Environmental Adjudication serves as the Ultimate Authority in the administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with applicable provisions of IC 4-21.5. Pursuant to IC 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

IT IS SO ORDERED in Indianapolis, Indiana this 18th day of January, 2007.

Hon. Mary L. Davidsen
Chief Environmental Law Judge